81-2056

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NO.

In The

Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF STAMFORD,
Petitioner
Cross-Respondent

V.

THEODORE IEVA,
Respondent
Cross-Petitioner

CROSS-PETITION BY THEODORE IEVA FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should *City of Newport* v. *Fact Concerts* be applied retroactively to exonerate a municipality from punitive damages awarded by a jury, where the municipality made no objection to the jury charge, requested no contrary instructions, and conceded the availability of punitive damages against it at trial?

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To The Honorable, The Chief Justice Of The United States, And The Associate Justices Of The Supreme Court Of The United States:

The cross-petitioner, Theodore Ieva, appellee in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on December 30, 1981. That decision affirmed, in part, and reversed, in part, the judgment of the United States District Court for the District of Connecticut entered in the above case on January 28, 1981.

OPINIONS BELOW

The judgment of the United States District Court for the District of Connecticut, upon a jury verdict, was entered without opinion.

The unreported Order of the United States Court of Appeals for the Second Circuit, and the judgment entered thereon, affirming the judgment for compensatory and punitive damages, as against the defendant, Thomas Grabowski, affirming the judgment for compensatory damages and reversing the judgment for punitive damages, as against the defendant, City of Stamford, are set forth at page 1a of the Appendix.

JURISDICTION

The Order and judgment of the United States Court of Appeals for the Second Circuit was entered on December 30, 1981 (1a). The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1254(1)

STATUTORY PROVISION AND RULE OF PROCEDURE INVOLVED

Title 42, §1983 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rule 51, Federal Rules of Civil Procedure, provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

The salient facts concerning the underlying incident of police brutality and Theodore Ieva's damages are set forth in the petition for certiorari by the City of Stamford (No. 81-1803) and Mr. Ieva's reply brief. In essence, this is a litigation arising out of the beating of the plaintiff by Stamford, Connecticut police officer Thomas Grabowski on January 7, 1974. After 12 days of trial, the jury found that the City of Stamford was directly responsible for the unconstitutional conduct by Officer Grabowski by reason of improper hiring, supervision, training, or discipline, and assessed damages. The trial court instructed the jury that it could award punitive damages against the City of Stamford under appropriate circumstances. Evidently motivated not only by the gravity of plaintiff's injuries, but by the potentially lethal character of the misconduct authorized, ratified and condoned by the City of Stamford, the jury awarded punitive damages of $100,000.00 in addition to compensatory damages of $115,000.00 against the City in a verdict rendered on January 22, 1981.

On appeal to the Second Circuit, the City of Stamford claimed for the first time that it is immune from an award of punitive damages under 42 U.S.C. §1983. The City's claim was based upon this Court's decision in *City of Newport* v. *Fact Concerts, Inc.*, 101 S.Ct. 2748 (1981), which was rendered three months *after* the verdict in the present case. Plaintiff's claim for punitive damages against the City was made in his original complaint filed in October, 1975. The City raised no objection to this claim at any time prior to the trial. At no time during the trial did the City claim any immunity from punitive damages. In the lengthy chambers conference preceding the jury charge on damages, the City made no claim of immunity, even though the Court mentioned that *City of Newport* was then pending before this Court. After the charge was given, counsel for the City objected, but only on the ground that the standards for punitive damages were different from those stated by the trial court.[1]

Thus, the City conceded at trial that it was *not immune* from a punitive damage award. The motion for a new trial filed by the City made no claim to immunity from punitive damages. On appeal, however, the Court of Appeals set aside the punitive damages awarded against the City of Stamford. The Court of Appeals reasoned, "Since this case comes to us on direct appeal, *City of Newport* requires us to set aside the punitive award against the City."

REASONS FOR THE ALLOWANCE OF THE WRIT

Theodore Ieva asks, pursuant to Rule 19.5, Supreme Court Rules, that this Court grant his cross-petition in the event the City of Stamford's petition is also granted. In *City of Newport*, this Court did not authorize the lower courts to disregard the requirement of Rule 51, Federal Rules of Civil Procedure, that

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[1]Counsel for the City stated: "Your charge as to punitive damages as to the City, the city must someway authorize, ratify or foster the actions. My objection is that is not the standard. There is a different standard."

a litigant who fails to make a timely objection to the charge is barred from claiming error in the instructions to the jury. Rather, this Court held that the policies of Rule 51 were adequately served when a litigant raised the objection in a motion for new trial, which squarely presented the issue and which was resolved by the trial court on a complete record. Disregarding the carefully limited exception to Rule 51 authorized in *City of Newport,* however, the Court of Appeals in this case upset a jury verdict despite the complete waiver of any objection by the City of Stamford in the trial court. This result cannot be squared either with Rule 51 or this Court's holding in *City of Newport.*

The holding of the court below is also inconsistent with *Black* v. *Stephens,* 662 F.2d 181 (3d Cir. 1981), *petition for cert. filed, sub nom. Stephens* v. *Black,* 50 U.S.L.W. 3550 (U.S. Jan. 12, 1982) (No. 81-1239), the only reported appellate decision on this issue in the wake of *City of Newport.* In *Black,* the Third Circuit Court of Appeals faithfully construed *City of Newport* so as to bar a municipality's attempt to set aside a punitive damage award retroactively. The policies of fairness to litigants and finality of adjudication militate in favor of the view adopted by the Third Circuit. Further erosion of the mandatory requirements of Rule 51 is unwarranted, and certiorari should be granted by this Court in the interests of procedural fairness and sound appellate jurisprudence.

ARGUMENT

I. Certiorari Should Be Granted To Resolve The Conflict Between The Decision Below And *City Of Newport* v. *Fact Concerts, Inc.*

Under the teaching of the *City of Newport,* the issue of municipal punitive damages liability was not preserved for appeal in the present case. This Court noted in *City of Newport* that the language of Rule 51 is "uncompromising" in its prohibition on appellate review of jury instructions absent a timely objection to the charge at trial. 101 S.Ct. at 2753. Review on the

merits was permitted on *City of Newport only* because the District Court reached the merits of this issue on a motion for a new trial: "Because the District Court reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves." *Ibid,* at 2754. Unlike the City of Newport, The City of Stamford's waiver of any claim to punitive damages immunity was complete, and Rule 51 forbids its tardy attempt to assert that immunity in the Court of Appeals.

Rule 51 serves the important functions of orderly judicial administration and fairness to the parties, and it prevents litigants from making a tactical choice to withhold a timely objection at trial in order to preserve a ground for appeal. *City of Newport,* at 2753; 2763 (dissenting opinion). The Rule insures that the trial judge is informed in precise terms of any objections and has an opportunity to correct any errors in the charge. *Marshall* v. *Nugent,* 222 F.2d 604 (1st Cir. 1955). Additionally, the rule protects jury deliberations from the distorting effect of the submission of issues which should have been withdrawn from jury consideration. Accordingly, courts deny appellate review to a litigant who fails to comply with the requirements of Rule 51. *Cohen* v. *Franchard Corp.,* 478 F.2d 115 (2d Cir. 1973); *U.S. for Use and Benefit of D'Agostino Excavators, Inc.* v. *Hayward-Robinson Co.,* 430 F.2d 1077 (2d Cir. 1970), *cert. denied,* 400 U.S. 1021 (1971). See also, cases cited in 5A Moore's *Federal Practice,* ¶51.04, at 51-9 et. seq. (1980); Wright and Miller, *Federal Practice and Procedure,* §2553, at 639 (1971).

No policy has been offered to justify avoiding the mandate of Rule 51 in this case. Even the "plain error" doctrine, under which an appellate court may sometimes review a jury charge notwithstanding the absence of a timely challenge to jury instructions, is not applicable here. Such review is available only to correct instructions so contrary to law as to be manifestly unjust. *Morris* v. *Travisono,* 528 F.2d 856, 859 (1st Cir.

1976); 9 Wright and Miller, *Federal Practice and Procedure*, §2558, at 675; *Cohen* v. *Franchard Corp., supra* at 124-25. In *City of Newport*, the Supreme Court majority and dissenting opinions agreed that jury instructions which permitted the award of punitive damages did not constitute one of the "obvious instances of injustice or misapplied law" which would warrant appellate review in the absence of an objection to the charge. 101 S.Ct. at 2754, 2764. That determination is conclusive against any claim in the instant case that this Court should reverse the verdict on the theory of plain error in the punitive damages charge. See also, *Whiting* v. *Jackson State University*, 616 F.2d 116, 126-27 (5th Cir. 1980); *Mid-America Food Service, Inc.* v. *ARA Services, Inc.*, 578 F.2d 691, 695-96 (8th Cir. 1978); *Williams* v. *City of New York*, 508 F.2d 356, 362 (2d Cir. 1974); *Bastista* v. *Weir*, 340 F.2d 74, 85 (3d Cir. 1965).

Moreover, sound appellate jurisprudence requires that the *City of Newport* result should not be applied retroactively to the present case, in which all trial court proceedings were concluded prior to the Supreme Court decision. *City of Newport* developed a new interpretation of the civil rights statute, 42 U.S.C. §1983, so as to eliminate municipal liability for punitive damages. Even where a new, controlling interpretation by the Supreme Court is based on constitutional grounds rather than merely statutory construction, retroactive application of the new ruling is generally not appropriate. *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940); *United States ex rel Angelet* v. *Fay*, 333 F.2d 12 (2d Cir. 1964) *aff'd.* 381 U.S. 654 (1965). The state of the law prior to a new judicial declaration "is an operative fact that cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage District* v. *Baxter State Bank, supra* at 374. Although this Court has not forbidden retroactive application in all cases, e.g., *United States* v. *Schooner Peggy*, 1 Cranch. 103 (1801), the Court has made clear that a new ruling should be applied only in a manner that will not prejudice those who might have relied on the prior state of the law. *Linkletter* v. *Walker, supra* at 627; *James* v. *United States*, 366 U.S. 213, 221 (1961).

In the present case, the plaintiff justifiably relied on the availability of punitive damages against the municipality in presenting his case to the jury. Plaintiff's counsel devoted a substantial portion of the evidence and the closing argument to the punitive damages issue. Had punitive damages not been available, the plaintiff would have focused exclusively on compensatory damages, and the jury might well have rendered a larger compensatory award. Also, the jury might well have determined that a larger punitive award against Officer Grabowski was appropriate for deterrence purposes if it knew that punitive damages could not be awarded against the City. The City's tardy claim of immunity also prevented the plaintiff from moving for a new trial of damages based upon the inadequacy of the compensatory award in the District Court, a motion which was unnecessary in light of the punitive award.

Several other factors militate against retroactive application of the *City of Newport* decision to the present case. Compare, *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971). There is no reason to reward the City of Stamford for a change in the law which it did nothing to institute, and when it acquiesced in a contrary interpretation. Denying retroactive application serves the interest of judicial economy, by preserving a judicial determination valid at the time it was rendered, and by refusing to permit relitigation by municipalities which have already had a full and fair trial. See generally, *Safarik* v. *Udall,* 304 F.2d 944 (D.C. Cir. 1962), *cert. denied,* 371 U.S. 901 (1962); *Lyons* v. *Westinghouse Electric Corp.,* 235 F.Supp. 526 (S.D.N.Y. 1964).

In short, in light of the City of Stamford's failure or deliberate refusal to raise any claims to immunity from punitive damages prior to this appeal, the jury verdict as to punitive damages, awarded because the City authorized, ratified or fostered the brutal beating of the plaintiff, should not be disturbed.

II. Certiorari Should Be Granted To Resolve A Conflict In The Circuits As To When The Mandatory Provisions Of Rule 51 May Be Waived.

In *Black* vs. *Stephens,* the Third Circuit Court of Appeals reached the opposite conclusion on the issue of granting an exemption from Rule 51 than did the court below. In *Black,* trial counsel for the municipality did object to the punitive damages charge, but not upon the theory that such damages may not be awarded under §1983 against the municipality. The *Black* court, after a careful analysis of *City of Newport,* concluded that there was no basis to exempt the municipality from the requirements of Rule 51 to permit elimination of the punitive damages awarded by the jury. 662 F.2d at 184, n.1. This decision is entirely consistent with the interpretation of Rule 51 applied by all federal courts. See, cases cited in 5A Moore's *Federal Practice,* ¶51.04, *supra,* and Wright and Miller, *Federal Practice and Procedure,* §2553, *supra.*

In the present case, the City of Stamford not only failed to make a timely objection raising its claimed immunity from punitive damages, but, on the contrary, conceded that such immunity did not exist. A decision that Rule 51 may be disregarded under these circumstances is susceptible of no convenient or principaled limitation. Any litigant could raise in the Court of Appeals new or different claims of law than those presented to the trial court in connection with the delivery of the charge to the jury. There is no distinction in principle between the issue of immunity from punitive damages and the issues of lack of personal jurisdiction, or the unavailability of any other remedy requested in the complaint. Review of the present case on certiorari is necessary to affirm the principle of finality incorporated in Rule 51.

CONCLUSION

For the foregoing reasons, Theodore Ieva respectfully requests that this Honorable Court issue a writ of certiorari on his cross-petition to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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May 5, 1982

APPENDIX A

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

In The

United States Court of Appeals

FOR THE SECOND CIRCUIT

Nos. 81-7134, 81-7212, and 81-7172

[Filed: Dec. 30, 1981]

THEODORE IEVA,
Plaintiff-Appellee-Cross-Appellant,

V.

THOMAS GRABOWSKI, *Et Al.*,
Defendants-Appellants-Cross-Appellees.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of December, on thousand nine hundred and eighty-one.

Present: HONORABLE WILFRED FEINBERG,
Chief Judge,
HONORABLE WALTER R. MANSFIELD,
HONORABLE JON O. NEWMAN,
Circuit Judges.

ORDER

The City of Stamford and Police Officer Thomas Grabowski appeal from a judgment entered on January 28, 1981 in the District of Connecticut (T. F. Gilroy Daly, Judge) following a jury verdict finding them liable to plaintiff Theodore Ieva for compensatory and punitive damages under 42 U.S.C. §1983 (1976). The suit arises from an episode in which Grabowski, while arresting Ieva on minor charges, struck him repeatedly on the head with a short version of a night stick known as a pocket stick. The jury awarded the plaintiff $7,500 compensatory and $5,000 punitive damages against Grabowski, and $115,000 compensatory and $100,000 punitive damages against the City. We affirm the judgment with the exception of the award of punitive damages against the City.

1. On appeal, Grabowski challenges only the punitive damages award against him. Although acknowledging that the plaintiff's §1983 claim for use of excessive force is not subject to the good faith defense available in suits alleging violations of the Fourth Amendment, *see Pierson* v. *Ray,* 386 U.S. 547, 557 (1967), Grabowski argues that an award of punitive damages is precluded by the jury's finding, in answer to Interrogatory 9, that he had a good faith belief that his use of a pocket stick to subdue the plaintiff was lawful.

Under standard formulation, a defense of good faith requires both subjective belief in the lawfulness of an action and a basis for the belief that is objectively reasonable under all the circumstances. The jury found, however, that Grabowski's use of force was excessive; that is, that he used more force than was reasonably necessary under the circumstances. Thus, even if he subjectively believed that he acted lawfully, using only necessary force, the fact that his belief was not objectively reasonable prevents him from satisfying the objective component of the good faith defense. The jury's finding of good faith in Interrogatory 9 does not contradict this logic. By its terms, Interrogatory 9 asked whether the officer's negligent *use* of his pocket stick was nevertheless in good faith, but did not specifi-

cally relate to the separate finding of excessive force. The jury could reasonably have concluded that Grabowski's initial decision to use the stick was taken in good faith, but that the subsequent *manner* of that use — the number of blows, the force of the blows, the striking of the head — justified imposing punitive damages. A jury's special verdicts are not to be disturbed if they can be harmonized under any reasonable interpretation. *Gallick* v. *Baltimore & Ohio Railroad,* 372 U.S. 108, 119 (1963).

Grabowski also contends that the jury instructions erroneously lowered the standards governing punitive damages by including "grossly negligent" among the phrases to describe behavior that would support a punitive award. Though the reference to gross negligence was ill-advised, we do not believe the passing reference to the phrase deflected the jury's attention from the proper standard, which was adequately set forth in the instructions. *See Stolberg* v. *Board of Trustees,* 474 F.2d 485, 489 (2d Cir. 1973). The phrase "grossly negligent" was followed by the alternative formulation "or failed to have reasonable regard for the substantial and unjustifiable risk that grave injury would result." Furthermore, the instruction was introduced by the statement that an award of punitive damages "should be based on whether you find that...Grabowski... engaged in intentional acts in gross disregard of the plaintiff's constitutional rights." These instructions taken as a whole conveyed the proper emphasis on willfulness or recklessness. We see no reason to disturb the jury's modest award of punitive damages against Grabowski.

2. The City of Stamford challenges the award of compensatory damages against it, arguing that there was insufficient evidence that it authorized, sanctioned, or ratified any unconstitutional actions by its police officers. *See Monell* v. *Dept. of Social Services,* 436 U.S. 658 (1978). We are satisfied that the evidence was minimally sufficient to permit the issue of the City's liability to reach the jury and to support the resulting ver-

dict.[1] There was evidence of other episodes, one before and one after the incident involving Ieva, in which Stamford police officers struck people on the head with pocket sticks. Although the slender evidence of a pattern of police misconduct culpably authorized or acquiesced in by the City, these incidents permitted an inference of municipal policy or custom, *see Owens* v. *Haas,* 601 F.2d 1242 (2d Cir. 1979); *Smith* v. *Ambrogio,* 456 F.Supp. 1130 (D. Conn. 1978), to tolerate police officers' striking heads with pocket sticks when overcoming nonlethal resistance to arrest, a tactic that the evidence permitted the jury to find posed an excessive risk of inflicting serious injury.

3. The additional award against the City of punitive damages must be set aside. *City of Newport* v. *Fact Concerts, Inc.,* 101 S.Ct. 2748 (1981), precludes awards of punitive damages against municipalities in §1983 suits. The trial court and the parties were well aware that *City of Newport* was pending before the Supreme Court and that the eventual decision would govern Stamford's liability for punitive damages. Since this case comes to us on direct appeal, *City of Newport* requires us to set aside the punitive award against the City.

We find the appellants' other claims to be without merit. The judgment of the District Court is affirmed, except for the award of punitive damages against the City of Stamford, which is set aside.

/s/ Wilfred Feinberg, Chief Judge

/s/ Walter R. Mansfield, Circuit Judge

/s/ Jon O. Newman, Circuit Judge

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[1]Though it has not been challenged on appeal, we note the inadvisability of asking the jury to assess the amount of compensatory damages separately with respect to the two defendants. By the time the case went to the jury, Grabowski and the City faced liability for inflicting the same injury. The jury should simply have been asked to determine the amount of damages suffered by Ieva. Of course, where punitive damages are available, they must be separately assessed against each defendant.

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v.

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Respondent and Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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June 4, 1982

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QUESTION PRESENTED FOR REVIEW

Should the vacating and setting aside of the award of punitive damages by the court below be affirmed, in light of *City of Newport v. Fact Concerts, Inc.*?

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CITY OF STAMFORD,

Petitioner and
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THEODORE IEVA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Consideration by the court below of the punitive damages question was proper, inasmuch as the City was not precluded from presenting the issue in that forum, the same having been considered, and dealt with by the trial court in a lengthy chambers conference, and announcing clearly the jury would be permitted to render such an award. Precise immunity exception to the jury instruction was excused by the trial court's expressions.

The court, and counsel, acted at trial with knowledge of the pendency of *City of Newport*, and of its potential outcome.

Retrospective application of the holding in *City of Newport* to this case, on direct review, by the court below, was the correct and appropriate judicial action. No factor existed counseling a contrary result, and the decision below was founded on appropriate application of prevailing law.

Sufficient procedural distinctions exist between the decision below, and *City of Newport* and *Black v. Stephens* to afford reconciliation of these decisions, leaving no significant conflict requiring settlement by the Court.

ARGUMENT

I.

THE DECISION BELOW VACATING THE AWARD OF PUNITIVE DAMAGES AGAINST THE CITY, IN LIGHT OF *CITY OF NEWPORT v. FACT CONCERTS, INC.*, WAS CORRECT AND APPROPRIATE.

A. Waiver Concepts Do Not Preclude Consideration Of The Question Of Municipal Immunity From The Imposition Of Punitive Damages.

The cross-petition herein contends for the restoration of the award of punitive damages against the City of Stamford, Connecticut (hereinafter referred to as "the City") vacated by the court below. The initial assertion offered in support of this prayer is founded on a waiver theory, under Rule 51, Federal Rules of Civil Procedure.

In this action the City did take exception to the charge on punitive damages, albeit not on precise immunity grounds.

The trial court was well aware of the pendency of *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) before this Court. The topic of punitive damages was the subject of a lengthy chambers conference prior to the giving of the jury instructions, throughout which the court was clear in its expression that this Court might find governmental entities immune from punitive damage awards, and that such decision might, if not properly presented to the jury, precipitate a mandatory retrial of this action. The court observed it would take proper steps to avoid this eventuality, and would permit the jury to consider such an award. The court, upon exception by the City to the punitive damages instruction, declined to reconsider the standards under which such an award might be made.

Under those circumstances, it was evident that further efforts to persuade the court to alter its views on the punitive damages issue would not have met with success.

Failure to press an objection to a jury instruction is not fatal, in all cases, to obtaining review of the issue involved. Circumstances exist which make it unnecessary for a party to take a highly specific exception to a jury charge, and yet obtain appellate review. The principal purpose of Rule 51 is to prevent new trials where the court might have corrected an error, if the same was timely called to its attention. Exceptions to a stringent application of the rule have been recognized.

In *Cohen v. Franchard Corporation,* 478 F.2d 115, 120, 122 (2d Cir. 1973), an appeal arose with respect to that portion of the instructions on the liability standard, to which no exception had been taken. The events immediately before delivery of the instructions were examined, producing the conclusion that the failure to except had been excused, permitting consideration of the issue on appeal.

The City urges that the holding in *Cohen* be applied here. Such an approach is consistent with the teaching of *City of Newport*, where no Rule 51 exception, on immunity grounds, was taken to the punitive damage instruction, and full appellate inquiry was allowed. The evolving nature of entity liability in § 1983 litigation seems to be the touchstone for sanctioning such review.

Avoidance of unnecessary retrials is a bedrock purpose for Rule 51. Here, absent clairvoyant knowledge of the outcome of *City of Newport*, the trial court could have done no more to deal with such a prospect than it did. An exception to the charge, on immunity grounds, would not have obviated the problem. The court and all counsel were well aware that one possible outcome of *City of Newport* might be a determination that municipalities are immune from punitive damage awards.

Based upon the foregoing, the City submits it made no conscious, knowing waiver of its right to question, and seek review of the punitive damage issue. Thus, the decision below ought not be disturbed on the basis of the contended-for strict construction of Rule 51, especially in light of the developmental nature of § 1983 actions against governmental entites.

B. Retrospective Application Of *City Of Newport v. Fact Concerts, Inc.* To Cases Pending On Direct Review Is Both Permitted And Appropriate.

The Court has held that retrospective application of its decisions effecting changes in the law is permitted, but not mandated, depending on an examination of several factors.

It has also instructed that, where new law intervenes between the decision below and a final decision on direct

review, the new law ought to be applied, the parties should be afforded the benefits of the new law, and a contrary judgment should be set aside. *Hamling v. United States,* 418 U.S. 87, 101-02 (1974); *Bradley v. School Board of Richmond,* 416 U.S. 696, 711 (1974); *Linkletter v. Walker,* 381 U.S. 618, 627 (1965); *United States v. Schooner Peggy,* 1 Cranch 103, 110 (1801).

The enforcement of new law in cases pending on direct review, when the new law is announced, appears to be the favored approach. *Vandenbark v. Owens-Illinois Glass Co.,* 311 U.S. 538 (1941); *Carpenter v. Wabash R. Co.,* 309 U.S. 23 (1940); *United States v. Chambers,* 291 U.S. 217 (1934); *Crozier v. Krupp,* 224 U.S. 290 (1912); *Dinsmore v. Southern Express Co.,* 183 U.S. 115 (1901).

On the other hand, only in those cases where a prior decision has become final will a rule of complete prospective application of the new law be adopted. *Tehan v. United States,* 382 U.S. 406 (1965); *Linkletter.*

Elements considered by the Court in determining whether to afford retrospective application to newly announced law include the presence, or absence, of a substantial period of justifiable reliance on prior standards, the potential burden on the administration of justice, and whether the purposes of the new standards may best be achieved without affording it retrospective application.

On June 6, 1978, the Court, in *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978), for the first time, permitted prosecution of money damage actions, under § 1983, against governmental entities. Thus, the maximum period of justifiable reliance on any prior law dealing with even compensatory, let alone punitive, damages, in § 1983 actions against municipalities, prior to the jury verdict herein,

rendered on January 19, 1981, was slightly over two years and seven months. The initial award of punitive damages presumably occurred sometime later. This hardly presents such a substantial period of justifiable reliance as would proscribe retrospective application of the newly announed law.

In *City of Newport,* at 257, n.14, the suggestion is made that the final outcome may well have been foreshadowed in prior cases on the punitive damage issue. Clearly, the trial court here appreciated the likelihood of the outcome which obtained. Where foreshadowing exists the Court has given little consideration to reliance arguments. *Hankerson v. North Carolina,* 432 U.S. 233, 241 (1977); *Berger v. California,* 393 U.S. 314, 315 (1969); *Roberts v. Russell,* 392 U.S. 293, 295 (1968).

Here, the reliance claim relates largely to Ieva's argument to the jury, trial tactics, and the amount recovered, rather than to any greater societal or legal principle.

It is noteworthy that, but for retrospective application of *Monell,* this matter would not now be before the Court. Prior to *Monell,* this action had been dismissed as to the City, and, six weeks after *Monell,* request was made for reconsideration of the dismissal, which was granted, and the action reinstated.

During trial and argument, all counsel should have known and appreciated that any punitive damage award was in jeopardy, hinging on the final decision in *City of Newport.* Thus, one must assume the most forceful and cogent case was presented on compensatory damages, as was possible. Surely, at this time, the Ieva trial tactics ought not become a hammer with which to punish the taxpayers of the City.

No burden on the administration of justice will result from retrospective application of *City of Newport* to

this action, since separate punitive damage awards were made against the City and the individual defendant, and these verdicts were further segregated from the awards of compensatory damages. No retrial, on any issue, will be required for the resolution of this issue.

The City contends that the purposes for the decision in *City of Newport* will best be served by applying its teaching retrospectively, at least to this action now in the direct review process. The Court has observed that historically governmental units have been immune from such awards, and that nothing exists in the legislative history of § 1983 to alter that concept. As a matter of sound public policy, the Court extended that immunity to civil rights litigation under the statute.

The Court characterized punitive damages as a "windfall to a fully compensated plaintiff" and observed that any possible deterrent effects are achieved by compensatory damage awards. Concern was voiced for already overburdened municipal treasuries, suggesting that punitive damage awards would likely be funded by either increased taxation, or curtailment of essential services, thereby shifting the burden to innocent citizens from the blameworthy actors.

In the absence of any persuasive societal purpose, other than to provide a direct economic benefit to this plaintiff, no compelling reason has been advanced to deny retrospective application of *City of Newport* to this action.

Speculation as to alternative jury deliberations which might have taken place if punitive damage elements had been removed at trial time are not convincing, since none will ever share the secret discussions leading to the verdict.

Based upon all of the foregoing, the City submits that vacating the punitive damage award was both sanctioned by applicable legal principles, and appropriate under the circumstances.

II.

NO CONFLICT EXISTS BETWEEN *CITY OF NEWPORT, BLACK v. STEPHENS,* AND THE DECISION BELOW.

The Ieva cross-petition contends that a sufficient conflict exists between the decision below, *City of Newport* and *Black v. Stephens,* 662 F.2d 181, 184 (3d Cir. 1981), *cert. denied, sub nom. Stephens v. Black,* 50 U.S.L.W. 3716 (U.S. March 9, 1982) (No. 81-1239) to mandate a full review on the Rule 51 issue.

Examination of the procedural history in *Black* affords ample grounds to reconcile it with both *City of Newport* and the decision below. In *Black* the issue of entity immunity from punitive damage awards was injected only after the briefing and argument process had been completed. After the decision by the Court, in *City of Newport,* the Third Circuit expressly invited litigation of the immunity question. The court then surveyed the entire record and found a want of any reference to the immunity issue.

Thus, in *Black,* no facts existed to bring the matter within the aegis of *Cohen,* dictating the court's proper application of Rule 51.

By way of procedural contrast, in this action, the punitive damage immunity issue cast its shadow over the proceedings from the time of trial and throughout the entire appellate process. This issue was considered, and fully discussed by the trial court prior to, and at the time of, charging the jury, and was fully briefed, argued,

considered and decided in the court below. Surely the instant case comes closer to *City of Newport* than to *Black*, and should be similarly treated here.

Based upon these distinguishing factors, the City urges the Court to find that no sufficient conflict exists between the decision below, *City of Newport*, and *Black* which requires settlement by this Court.

CONCLUSION

For the above reasons, it is respectfully requested that this Honorable Court deny the cross-petition herein.

Respectfully submitted,

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